Neutral Citation Number: [2025] EWCA Civ 1308

Case No: CA-2024-001597

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
Upper Tribunal Judge Elizabeth Cooke
[2024] UKUT 120 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 October 2025

Before :

LORD JUSTICE LEWIS
LORD JUSTICE NUGEE
and
LORD JUSTICE JEREMY BAKER

- -

Between :

(1) GRAHAM BRADLEY **(2) MICHAEL RHODES**	**Applicants / Respondents to Appeal**
- and -	
ABACUS LAND 4 LTD	**Respondent to Application/ Appellant**

- -
- -

Tom Morris (instructed by **JB Leitch Ltd**) for the **Appellant**
Michael Walsh KC and Claudia Barry (instructed by **direct access**) for the **Respondents**

Hearing dates: 22 and 23 July 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on 16 October 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Nugee:

Introduction

1. This appeal from the Upper Tribunal (Lands Chamber) (**"the UT"**) concerns a challenge by leaseholders of flats in a building in London to service charges levied by their landlord. The relevant provision requires the landlord to act reasonably, and the particular question is whether the landlord was acting reasonably when it decided to include in the service charge the entirety of costs associated with a gym in the building.

2. A challenge to the service charges by two leaseholders, Mr Bradley and Mr Rhodes (**"the Leaseholders"**), failed in the First-tier Tribunal (**"the FTT"**), but succeeded (in part) on appeal to the UT where it was heard by Judge Elizabeth Cooke (**"the Judge"**).

3. The landlord, Abacus Land 4 Ltd (**"Abacus"**), now appeals to this Court with the permission of Snowden LJ. We have heard well presented arguments from Mr Tom Morris for Abacus and from Mr Michael Walsh KC, who appeared with Ms Claudia Barry, for the Leaseholders.

4. For the reasons that follow, I prefer those of Mr Morris and would allow the appeal and restore the decision of the FTT.

The lease terms

5. Romney House in Marsham Street, Westminster was constructed in the 1930s as an office block but was converted in 2006 to provide 168 residential flats, and four commercial units on the ground floor. It includes a gym in the basement.

6. The Leaseholders are owners of long leases of two of the flats in the building, Nos 202 and 206. Their leases are in similar form, and it is not disputed that the leases of the flats (**"the Flat Leases"**) are all in materially identical form. I can take the lease of No 206 as an example. It was granted on 28 April 2006 by Abacus's predecessor, a company called Romney House Developments Ltd, as Landlord to three individuals as Tenant for a term of 999 years from 1 January 2004 in consideration of a substantial premium and a ground rent, initially of £350 per year.

7. By clause 3 the Tenant covenants with the Landlord to perform and observe the covenants in schedule 4. This includes covenants to pay service charges in paragraphs 10 and 11.

8. Paragraph 10 of schedule 4 provides, so far as material, as follows:

> "(a) To pay to the Landlord within seven days of demand the Residential Service Charge Proportion of:-
>
> (i) such of the costs charges and expenses which the Landlord shall incur in complying with its obligations set out in Part I of the Sixth Schedule hereto which the Landlord (acting reasonably) designates as being a Residential Service Charge Item

(ii) the costs charges and expenses which the Landlord shall incur in doing any works or things to those parts of the Building utilised by the residential flats owners and/or occupiers for the maintenance and/or improvement thereof and

(iii) any other costs charges or expenses incurred by the Landlord which the Landlord designates as a Residential Service Charge Item

(b) To pay to the Landlord within seven days of demand the Building Service Charge Proportion of :-

(i) such of the costs charges and expenses which the Landlord shall incur in complying with its obligations set out in Part I of the Sixth Schedule hereto which the Landlord (acting reasonably) designates as being a Building Service Charge Item

(ii) the costs charges and expenses which the Landlord shall incur in doing any works or things to the parts of the Building for the maintenance and/or improvement of the Building and

(iii) any other costs charges or expenses incurred by the Landlord which the Landlord designates as a Building Service Charge Item

(c) (if the Tenant has an exclusive right under this Lease to use a Parking Space) to pay to the Landlord within seven days of demand the Parking Service Charge Proportion of :-

(i) all costs charges and expenses which the Landlord shall incur in complying with the obligations set out in Part II of the Sixth Schedule

(ii) the costs charges and expenses which the Landlord shall incur in doing any works or things to the Parking Area for the maintenance and/or improvement of the Parking Area and

(iii) any other costs charges or expenses incurred by the Landlord which the Landlord designates as a Parking Service Charge Item

(d) notwithstanding anything herein contained the parties agree that if the Landlord shall consider that any part or parts of the costs charges and expenses which the Landlord shall incur as aforesaid shall be the subject of contributions from persons other than the lessees for the time being of the Estate then the Landlord shall be entitled to reduce the amount of the costs charges and expenses in question to which the Tenant is obliged to contribute by such sums as the Landlord shall in its absolute discretion consider reasonable rather than allocating the total amount of those costs charges and

expenses and in this connection the Tenant acknowledges that the discretion conferred upon the Landlord under the provisions of this clause is an absolute discretion which shall be exercisable by the Landlord in such manner and upon such terms and at such times as the Landlord shall consider appropriate

…

(f) where an item of expenditure shall be incurred which shall fall to be treated as an item to which the Tenant is obligated to contribute towards under the provisions herein contained the Landlord shall be entitled in its reasonable discretion to designate whether such an item of expenditure shall be treated as a Residential Service Charge Item and/or a Building Service Charge Item and/or a Parking Service Charge Item".

9. Paragraph 10 uses a number of defined terms. These are defined in clause 1 as follows:

Building	means the building ... constructed on the Estate [itself defined as Romney House]…
Building Service Charge Item	means an item of expenditure which is (or is intended) to be chargeable (in whole or in part) to the lessees of the Building (both residential and commercial)
Building Service Charge Proportion	means such fair proportion as the Landlord acting reasonably shall from time to time determine
Parking Service Charge Item	means an item of expenditure which is (or is intended) to be chargeable (in whole or in part) to the lessees who have a right to use one or more parking spaces in the Parking Area
Parking Service Charge Proportion	means the fraction of the costs charges and expenses referred to in paragraph 10(c) of the Fourth Schedule hereto of which the numerator is the number of parking spaces to be allocated to the Tenant and the denominator is the total number of parking spaces in the Parking Area
Residential Service Charge Item	means an item of expenditure which is (or is intended) to be chargeable (in whole or in part) to the residential lessees of the Building
Residential Service Charge Proportion	means such fair proportion as the Landlord acting reasonably shall from time to time

determine.

10. Reverting to schedule 4, paragraph 11 contains provisions requiring the Tenant to pay half-yearly sums on account of the estimated service charge for the year; and paragraph 13 to pay any balancing charge due after the costs have been incurred and certified. Paragraph 12 provides that any sums payable under paragraphs 10, 11 and 12 [*sic* but presumably intended to be 13] should be deemed to be due by way of additional rent.

11. The Flat Leases do not specifically refer to the gym. But clause 2 demises the Demised Premises, defined in clause 1 as the Apartment together with the appurtenant rights set forth in schedule 2, and one of those rights, by paragraph 3 of schedule 2, is as follows:

> "The right (in common as aforesaid [that is, in common with the Landlord and all others having the like right]) to use such facilities (if any) within the Building and the Estate that may from time to time be designated by the Landlord for use (with or without others) by the Tenant (including but not limited to the lift if any serving the Building)".

There is also a definition of "Common Parts" in clause 1 which includes the following:

> "those parts of the Building and the Estate intended for the communal use by the Tenant with (or at the discretion of the Landlord without) other occupiers of the Building and the Estate".

It is common ground between the parties that when the Flat Leases were granted the gym was intended to form part of the Common Parts.

12. The service charge covenant in paragraph 10 of schedule 4 refers to the Landlord's obligations in Parts I and II of schedule 6. Clause 5(a) contains a covenant by the Landlord with the Tenant to perform and observe the obligations set out in schedule 6. Part I of schedule 6 contains a number of obligations on the Landlord in relation to the Building and the Estate (such as to repair the structure and exterior of the Building and to insure) whereas Part II is only concerned with obligations in relation to the Parking Area and parking spaces within it.

13. The obligations in Part I of schedule 6 include the following:

> "3. To keep in good repair and decorative condition:-
>
> …
>
> (f) the Common Parts and all fixtures and fittings in the Common Parts (including lifts and refuse shoots if any) and additions thereto (including any renewal and replacement of all worn or damaged parts)
>
> 4. To maintain the facilities from time to time benefiting the

Building…

5. To maintain the facilities from time to time benefiting the Estate…

6. To provide such facilities for the benefit of the Building as the Landlord (acting reasonably) may from time to time determine

7. To provide such facilities for the benefit of the Estate as the Landlord (acting reasonably) may from time to time determine."

The gym

14. From 2006 until 2013 the leaseholders of the flats had exclusive use of the gym. From 2006 to 2010 it was open around the clock; in 2010 the landlord and the residents agreed that it would be open from 6 am to 10 pm each day. The then landlord charged 100% of the costs of maintaining the gym to the residential leaseholders as part of the service charge. There has never been any dispute over that, and in their application to the FTT the Leaseholders expressly accepted that they were not seeking to challenge the inclusion of 100% of the gym costs in the service charges from 2006 to 2013.

15. By a lease dated 25 October 2013, however, Romney House Developments Ltd granted a lease of the gym (referred to as "the Unit") to Nash City Ltd (**"the Gym Lease"**). It appears that the Gym Lease was shortly afterwards assigned to Mr Adam White, who remains the proprietor and who operates a personal training business in the gym. The Gym Lease was also for a term of 999 years from 1 January 2004. No premium was payable and the rent was an initial £5,000 per year (subject to 5-yearly upward only rent reviews in line with increases in RPI with minimum and maximum increases equivalent to 1% and 5% per year respectively).

16. The covenants by the Tenant (**"the Gym Tenant"**) (in schedule 4) included a covenant to use for the Permitted Use only, which was use as a gym and supplemental uses. The Gym Lease does however contain several provisions which make it abundantly clear that this was not intended to derogate from the use of the gym by the leaseholders of the flats. First, clause 2 contains acknowledgments as follows:

"(e) The parties acknowledge that the Occupiers have rights of entry onto the Unit pursuant to the Flat Leases to utilise the Gym Equipment (and are entitled to bring with them a personal trainer specifically for their own personal training) and the demise to the Tenant is subject to those rights of the Occupiers

(f) It is acknowledged that the Gym Equipment belongs to the Landlord but is being provided in the Unit by the Landlord for the common use by the Tenant the Occupiers and those authorised by the Tenant on the basis that:

(i) the Landlord shall not be entitled to remove or replace any of the Gym Equipment except as hereinafter permitted or required

(ii) the Tenant shall not allow such number of Guests to use the

> Gym Equipment that the Occupiers are routinely prevented from using the Gym Equipment (with the intent that there should always be Gym Equipment available for use by a reasonable number of Occupiers)."

"Occupiers" is defined in clause 1(a) to mean the occupiers of the residential flats in the Building from time to time; and "Guests" is defined to mean those, other than Occupiers, using the Gym Equipment with the permission of the Tenant.

17. Second, clause 5 contains covenants by the Landlord including the following:

> "(c) The Landlord will provide to the Unit (at its own cost) heating lighting water and electricity for the use by the Tenant the Occupiers and the Guests;
>
> (d) The Landlord will
>
> (i) provide to the Unit (at its own cost) the Gym Equipment for the communal use by the Tenant the Guests and the Occupiers;
>
> (ii) maintain the Gym Equipment (at its own cost) in a good state o[f] repair and condition;
>
> (iii) regularly service the Gym Equipment at its own cost; and
>
> (iv) replace the Gym Equipment (at its own cost) with like items (or items of a superior quality) as and when reasonably required or when any item thereof is beyond economic repair
>
> (e) The Landlord will provide to the Unit a suitable quantity of towels (as reasonably required by the Tenant) for use by the Occupiers the Tenants and the Guests."

18. Third, the Unit was demised together with the rights specified in schedule 2. These included in paragraph 6:

> "The right for the Tenants and Guests to use the Gym Equipment from time to time in the Unit in conjunction with the Occupiers provided that the Tenant shall not allow such number of Guests to use the Gym Equipment that the Occupiers are routinely prevented from using a reasonable proportion of the Gym Equipment (with the intent that there should always be Gym Equipment available for use by a reasonable number of Occupiers)".

This echoes the almost identical provision in clause 2(f)(ii).

19. Fourth, the Tenant by clause 3 covenants with the Landlord to perform and observe the obligations in schedule 4. These included the following (in paragraphs 19, 21, 23 and a second 23):

> "19. In the event of an Occupier utilising any of the Gym Equipment

> when the Tenant is present and requesting Assistance on how to use the Gym Equipment in question (as opposed to requesting personal training services) to provide reasonable assistance to the Occupier to explain how the item of Gym Equipment in question actually operates
>
> …
>
> 21. Not to use all the Gym Equipment at the same time for Guests but to make sure that there is always a reasonable proportion of the Gym Equipment available for use by Occupiers.
>
> …
>
> 23. To ensure that the Unit is staffed at the cost and expense of the Tenant by suitably qualified personnel provided by the Tenant between the hours of 7am to 10am and 5pm to 8pm Monday to Saturday (excluding bank and public holidays)
>
> 23. To launder the towels provided by the Landlord in the Unit and make the same available to both Guests and Occupiers".

20. Finally clause 4 contains a covenant by the Tenant with the Landlord and with the other lessees of all other parts of the Building to perform and observe the obligations set out in schedule 5. These included (by paragraph 7):

> "To permit the Landlord the Landlord's agents the lessees of other parts of the Estate and those authorised by them to enter the Unit in accordance with the exceptions and reservations set out in the Third Schedule hereto".

Schedule 3 includes, as part of the rights to which the Unit is subject or which are excepted or reserved, the following (by paragraph 4(a)):

> "All easements or quasi-easements and all rights and benefits of a similar nature over under or through the Unit or any part or parts thereof now enjoyed or intended to be enjoyed by all and/or any other part of the Estate".

21. As set out above the Gym Lease contains covenants by the Landlord in clause 5 to provide, maintain, service and replace when required the Gym Equipment at its own cost. It also contains covenants by the Landlord in schedule 6 in terms very similar to those in the Flat Leases, including covenants to repair the structure and exterior of the Building and Common Parts and to insure. It is noticeable however that there are no provisions for the Tenant to pay any contribution to the costs by way of service charge.

22. From 2013 the leaseholders of the flats continued to have the use of the gym from 6 am to 10 pm, albeit shared with Mr White and his clients. In 2014 the then freeholder agreed with the residential leaseholders that the rent received under the Gym Lease would be put towards the costs of maintaining the gym, thereby reducing the leaseholders' overall liability by £5,000 a year. In 2017 Abacus acquired the freehold

subject to both the Flat Leases and the Gym Lease; it continued to credit the rent received from Mr White to the costs of maintaining the gym.

23. The gym was closed during the 2020 lockdown. After the 2020 lockdown the gym was reopened but the residents' access was considerably reduced. Mr Rhodes' evidence was that the residents were only allowed access from 7 am to 10 am and from 5 pm to 8 pm (and not at all on Sundays or bank holidays). (It may be noted that these are the hours during which the Tenant under the Gym Lease covenanted by paragraph 23 of schedule 4 to have the gym staffed: see paragraph 19 above).

24. In 2019 there was a dispute between Mr White and Abacus. Mr White complained that Abacus was in breach of its repair and maintenance obligations under the Gym Lease. This dispute was settled in 2021 on terms that Abacus would refurbish the gym and would also take no rent for a period of 3 years. That meant that the credit of the rent to the service charge account also stopped. In 2021 Abacus served notices on the leaseholders under the provisions of the Landlord and Tenant Act 1985 (**"L&TA 1985"**) indicating its intention to carry out major works to the gym to be paid for through the service charge. Estimates for the cost of these works were later provided showing the cost at over £218,000.

Application to the FTT

25. The Leaseholders applied to the FTT in December 2022. Their application challenged the inclusion in the service charges for 2013 onwards of the entirety of the costs attributable to the gym. They sought a determination that in the light of the grant of the Gym Lease it was not fair and reasonable for the freeholder to recover 100% of the gym costs from the residential leaseholders, suggesting that they should only pay a proportion of the costs from 2013 to 2020, and none of the costs from 2020.

26. As the Judge points out in her decision in the UT this was not an application brought under s. 19 L&TA 1985. The Leaseholders were not saying that the costs were not reasonably incurred or that work was not of a proper standard. The challenge was to the way that Abacus had made decisions under the terms of the Flat Leases which required it to decide which costs should be charged to the residential leaseholders. The jurisdiction of the FTT that was invoked was that in s. 27A L&TA 1985 which (as set out below) provides that an application may be made to the FTT for a determination whether a service charge is payable, and if so, the amount that is payable. This therefore enables the FTT to decide whether a service charge is properly claimed under the terms of the lease.

27. The Leaseholders' statement of case in the FTT set out a number of contentions under various different heads, concerned with (1) the common costs, (2) direct gym costs, (3) the proposed major works and (4) legal costs of the dispute with Mr White respectively. In summary what was said was as follows:

    (1) So far as common costs were concerned, an appropriate share should have been apportioned to the Gym Lease, as the gym benefited from them, and the share apportioned to the residential leaseholders reduced accordingly. The appropriate share was calculated (on the basis of the surface area of the gym) at 1.16% for costs which were shared between the residential leaseholders and

the commercial tenants (such as buildings insurance or communal electricity) and 1.22% for costs shared between the residential leaseholders alone (such as water supply).

(2) So far as direct gym costs were concerned (such as maintenance of the gym or gym equipment) the landlord should have apportioned to the residential leaseholders no more than a proportion of the costs incurred on the gym reflecting the fact that these costs benefited Mr White as tenant under the Gym Lease. That was put at no more than 40% for the period from 2013 to 2020; and from 2020 onwards it was said that no costs were recoverable.

(3) So far as the proposed major works were concerned, it was again said that none of the costs were recoverable.

(4) None of the costs of the dispute with Mr White should have been recoverable either.

It was acknowledged that since Mr White was not liable under the terms of the Gym Lease to contribute anything by way of service charge, any costs that were not recovered from the residential leaseholders would be borne by Abacus itself.

28. The application was heard by the FTT (Judge Silverman and Mr S Johnson) in June 2023 and their decision was released on 7 July 2023. They dismissed the application, finding the service charges demanded by Abacus in respect of gym maintenance and litigation costs for the years 2013-2023 inclusive to be payable and reasonable in amount.

29. In relation to the period from 2013 to 2020 the FTT held that the lengthy pattern of undisputed payments inclined them to conclude that there was an irresistible implication or inference that the charges had been agreed or admitted, with the result that they lacked jurisdiction.

30. In relation to the period from 2020 onwards (and the earlier period if they were wrong that they lacked jurisdiction) they considered whether the freeholder could be said to have acted reasonably in exercising its discretion to allocate 100% of the service charges attributable to the gym to the residential leaseholders. They concluded that it had.

31. The FTT also rejected a number of other contentions such as that the gym could no longer be considered as "Common Parts" and that the litigation costs were not recoverable.

Appeal to the UT

32. The Leaseholders appealed to the UT. Permission to appeal was granted in the UT by Martin Rodger KC, the Deputy Chamber President. In granting permission he said that the appeal provided an opportunity for the UT to consider an issue of general importance, namely the extent of the FTT's jurisdiction under s. 27A L&TA 1985 to review the exercise by a landlord of a contractual discretion to select which expenditure should be contributed to by residential leaseholders and which by commercial tenants or by the landlord itself, drawing the parties' attention to the

recent decision of the Supreme Court in *Aviva Ground Rent Investors GP Ltd v Williams* [2023] UKSC 6, [2023] AC 855 (***"Aviva"***).

33. The appeal was heard by Judge Cooke in March and April 2024 and she released her decision on 15 May 2024 at [2024] UKUT 120 (LC).

34. After setting out the factual background to the appeal the Judge turned to the legal background. She considered *Aviva* and other authorities and concluded (at [51]) that an express requirement in a lease to act "reasonably" in exercising a discretion refers to objective reasonableness; by contrast where a landlord's discretion is unqualified then the test to be applied is one of rationality only.

35. She then dealt with the FTT's decision and the Grounds of Appeal. One (which concerned the recovery of the litigation costs incurred by Abacus in its dispute with Mr White) was conceded. The Judge dismissed another (which concerned the period from 2013 to 2020 when the service changes were paid without dispute). Neither issue has been raised on the present appeal.

36. She then considered the main question on appeal which was whether Abacus had acted reasonably. At [100] she reiterated that an express requirement to act "reasonably" in exercising a discretion conferred by a lease is likely to refer to, and should be understood to refer to, objective reasonableness. If the FTT applied a rationality test they therefore applied the wrong test (at [106]); if however they did intend to apply a test of objective reasonableness then they reached the wrong outcome. It was manifestly unfair, and therefore not objectively reasonable, for the residential leaseholders to pay the whole of the gym costs after 2020 when they no longer had exclusive use of the gym (at [107]).

37. She therefore set aside the FTT's decision that Abacus's decision to charge the whole of the gym costs to the residential leaseholders was in accordance with the terms of the lease (at [111]). She also held that there was no scope for either tribunal to remake what the lease designates as the landlord's decision: Abacus would therefore have to try again, preferably in discussion with the residential leaseholders (at [112]).

Grounds of Appeal

38. Abacus appeals to this Court, with permission granted by Snowden LJ. A number of grounds are articulated in its Grounds of Appeal, but I think there is really only one ground, namely that the Judge erred in construing the words "acting reasonably" in the Flat Leases as requiring Abacus to reach a decision which is objectively reasonable or fair (this is paragraph 2 of the Grounds of Appeal). The other paragraphs elaborate a number of arguments in support of this contention; it is not necessary to detail them here and I will deal with them so far as necessary below.

39. The Leaseholders have served a Respondent's notice. This challenges the decision of the Judge that if Abacus's decision was not in accordance with the Flat Leases the tribunals had no power to remake the decision, and contends that a tribunal which reviews the exercise of a landlord's discretion can substitute its own view if the landlord's exercise of discretion is flawed. If therefore the appeal fails, the Leaseholders invite the Court to remit the matter back either to the UT or the FTT.

The precise issue

40. Before coming to the substantive question, I think it is helpful to be clear about the precise issue before the Court.

41. I have set out paragraph 10 of schedule 4 of the Flat Leases above (see paragraph 8). There was no dispute between counsel that this paragraph contemplates a two-stage process. First, certain expenses are identified which are allocated to one of three categories, namely Residential, Building or Parking Service Charge Items. By reference to the definitions of these terms in clause 1 (see paragraph 9 above), one can see that they are items which are intended to be chargeable to (i) the residential lessees, (ii) the residential and commercial lessees, and (iii) those with a right to park a car respectively. Then the items in each category (or "pot" or "bucket") are apportioned between those liable to pay. This is in principle a separate exercise. The identification of what goes into each pot at the first stage is dealt with in paragraph 10 (in sub-paragraphs (a), (b) and (c) respectively). The identification of how much of each pot a particular leaseholder pays is dealt with through the definitions of Residential, Building and Parking Service Charge Proportions in clause 1.

42. Thus, to take the simplest case, that of the Parking Service Charge, paragraph 10(c) provides that the Landlord's costs of complying with Part II of schedule 6 (which contains covenants concerning the Parking Spaces) fall within the pot of Parking Service Charge Items, as do any other costs incurred by the Landlord on maintenance or improvement of the Parking Area, and any other costs designated by the Landlord as Parking Service Charge Items. Once the expenses which go into the pot have been identified, the second stage is to apportion those expenses between those liable to pay, which is limited to those lessees with parking spaces (it is apparent that not all lessees have such a space). The actual apportionment is then fixed, being a straightforward arithmetical exercise of dividing up the expenses equally between each person entitled to a space: see the definition of Parking Service Charge Proportion. So if there are 70 spaces and 70 lessees with a space, they will pay 1/70 each. It may be noted that there is little need for these purposes for the Landlord to make any decisions as to how to apportion the costs: under paragraph 10(c)(i) *all* the Landlord's expenses of complying with Part II of schedule 6 go into the pot, as do under paragraph 10(c)(ii) any other expenses incurred by the Landlord in maintaining or improving the Parking Area. It is only under paragraph 10(c)(iii), which permits the Landlord to designate other expenses as Parking Service Charge Items, that the Landlord may have a decision to make. That decision is not expressly constrained by paragraph 10(c)(iii), but paragraph 10(f) provides that the Landlord may "in its reasonable discretion" designate whether an item of expenditure is to be treated as a Residential, Building or Parking Service Charge Item. No doubt some such constraint would have been implicit anyway, as it obviously could not have been intended that the Landlord could designate as a Parking Service Charge Item some expense that had nothing to do with the Parking Area.

43. When it comes to the Residential and Building Service Charge Items however there are two differences. First, under paragraph 10(a)(i) and paragraph 10(b)(i) the expenses which go into the Residential and Building pots are:

> "*such of* the costs charges and expenses which the Landlord shall incur in complying with its obligations set out in Part I of the Sixth Schedule

> hereto which the Landlord (acting reasonably) designates as being a Residential [*or* Building] Service Charge Item" (emphasis added).

That may be contrasted with paragraph 10(c)(i) under which all the expenses incurred by the Landlord under Part II of schedule 6 go into the Parking pot. There is a simple explanation for that: Part I of schedule 6 contains covenants by the Landlord (such as to repair, maintain and insure the Building and Estate) which do not distinguish between those matters which will benefit only the residential leaseholders and those which will also benefit the commercial tenants. So there has to be a division of the costs incurred by the Landlord under Part I of schedule 6 between those that ought to be borne by the residential leaseholders alone, and those that should also be contributed to by the commercial tenants. That division is contemplated by paragraphs 10(a)(i) and 10(b)(i), each of which expressly requires the Landlord to act reasonably in designating a cost, charge or expense as a Residential or Building Service Charge Item; and again this is supplemented by paragraph 10(f) which provides for the Landlord "in its reasonable discretion" to designate items as falling within the Residential or Building pots.

44. The other difference between the treatment of the Parking pot and the Residential and Building pots is that the proportion to be borne by any particular lessee is not (as in the case of the Parking items) a straightforward equal division but is:

> "such fair proportion as the Landlord acting reasonably shall from time to time determine".

45. There are a number of different ways in which expenses chargeable to lessees can be divided between them, although in practice this is often done by reference to the respective surface areas of their flats, and it appears that this is what was done at Romney House.

46. In the present case I do not think we are concerned with this second stage of dividing up the expenses between the leaseholders. What Abacus in fact did was designate all the gym costs as Residential Service Charge Items and then apportion them in exactly the same way as other items in the Residential pot, that is by reference to the size of each leaseholder's flat. If it was entitled at the first stage to designate the entirety of gym costs as Residential items, then I do not think that there was anything wrong with the second stage of allocation between the leaseholders. No-one has suggested that the division of costs as between the leaseholders should have been done on any different basis.

47. In the UT, the Judge agreed (at [97]) that the lease contemplates a two-stage process; first the Landlord must allocate charges between the Residential and Building Service Charges, and then it must determine a fair proportion for each leaseholder to pay. But at [98] she said that she did not agree that the two decisions were completely isolated from each other, and at [105] she said that the two decisions "bleed into each other". Mr Walsh sought to support this; but I prefer on this point the analysis put forward by Mr Morris, namely that the real question on appeal is whether Abacus as the Landlord was entitled to put the entirety of the gym costs into the Residential pot to be borne by the residential leaseholders. If it was, then at the second stage, there seems to me no doubt that it was also entitled to divide those costs between the leaseholders as it did.

48. The Judge had a point arising from the definitions of Residential and Building Service Charge Items, each of which refers to an item of expenditure chargeable "in whole or in part" to the residential lessees, or residential and commercial lessees: see her decision at [10] and [101]-[104]. The point was that this contemplated that the whole of the expenditure itself was (for example) the Residential Service Charge Item even if only part of it was chargeable to the residential lessees, and hence each lessee was to pay a "fair proportion" of that whole, not of the part payable by the residential lessees. This is a very subtle point – the Judge herself said that she was conscious that she was making angels dance on pinheads and she suspected the parties did not do such an analysis – and I do not myself think it can bear the weight that the Judge put on it. It is admittedly not obvious why the drafter of the Flat Leases added the words "in whole or in part" to the definitions of Residential and Building (and Parking) Service Charge Items, but I am unpersuaded that the effect was that a Residential Service Charge Item could consist of an item of expenditure greater than that intended to be chargeable to the residential lessees.

49. I think the explanation for the drafting must be that a single item of expenditure might fall into more than one pot and be chargeable in part to each of two different pots. Suppose for example the Landlord incurred £100,000 on some works, part of which benefited the Parking Area and the remainder the Building as a whole. What one would expect is that the Landlord could add the appropriate part to each pot, so that say £10,000 was added to the Parking pot and £90,000 to the Building pot. This I think is precisely what paragraph 10(f) of schedule 4 provides, as it entitles the Landlord "in its reasonable discretion to designate whether an item of expenditure shall be treated as a Residential Service Charge Item and/or a Building Service Charge Item and/or a Parking Service Charge Item". In this provision the words "and/or" enable the Landlord to designate the expenditure as both a Building Service Charge Item and a Parking Service Charge Item, and paragraphs 10(b)(iii) and 10(c)(iii) then entitle the Landlord to include those items in the Building pots and Parking pots respectively.

50. In such a case I think the "Building Service Charge Item" and "Parking Service Charge Item" must be the £90,000 and £10,000 respectively, not (as the Judge thought) the £100,000. One can see why she took that view. Paragraph 10(f) entitles the Landlord to designate "an item of expenditure" as both a Building and a Parking Service Charge Item; and the definition of Building Service Charge Item for example (see paragraph 9 above) is:

> "an item of expenditure which is (or is intended) to be chargeable (in whole or in part) to the lessees of the Building (both residential and commercial)".

It is not difficult to see why one might assume that the "item of expenditure" was the whole £100,000, that being chargeable in part to the Building lessees. Under the definition of Building Service Charge Proportion each Building lessee would then be liable to pay a "fair proportion" of that item, which could be done in such a way that collectively they did not pay more than 90% of the £100,000. But the difficulty with that is that, as explained above, the division of the Parking Service Charge Items between the lessees with parking spaces does not contain any provision for them to pay a fair proportion: it is an arithmetical one which (assuming the spaces are all let) will always add up to 100%. So one cannot include the whole of the £100,000 as a

Parking Service Charge Item as the lessees with parking spaces would end up paying £100,000 between them, rather than £10,000 as they should. It follows in my view that only the £10,000 can be treated as the Parking Service Charge Item; and that it really follows that only £90,000 should be regarded as the Building Service Charge Item.

51. The upshot of that rather long digression is that I accept the analysis put forward by Mr Morris: at the first stage the Residential, Building and Parking Service Charge Items are those amounts which go into the respective pots; those items are then divided up at the second stage among those liable to bear them by the Residential, Building and Parking Service Charge Proportions respectively. As I have already said, on that view I do not think we are concerned with the second stage which is solely concerned with how the costs chargeable to residential leaseholders are split between them. I therefore do not think we are concerned with whether they are being asked to pay a "fair proportion" of the costs.

52. I may add that one of the questions touched on in argument was whether the same Residential Service Charge Proportion has to be used for all the items in the Residential pot. Mr Morris submitted that it did, each leaseholder being liable to pay "*the* Residential Service Charge Proportion" of the Residential Service Charge Items. He submitted that this contemplated a single figure, not one that could differ according to the different items. I accept that that would seem grammatically to be the more natural reading; but Mr Walsh showed us a decision of the FTT dated 24 September 2020 (LON/00BK/LSC/2020/0132). This was an application by Abacus itself against some of the leaseholders at Romney House in which Abacus successfully argued that the costs of an air-conditioning system (known as a Variable Refrigerant Volume or VRV system) should be borne solely by the seven leaseholders whose flats benefited from the VRV system rather than by the residential leaseholders as a whole. That seems inconsistent with the stance adopted by Mr Morris in the present appeal; and the good sense of the decision is obvious. In those circumstances I am inclined to think, as the FTT in that case did, that it is indeed possible to have a differing Residential Service Charge Proportion for different items. But the point does not arise in the present appeal. I do not think we need to actually decide it, and in those circumstances I do not propose to do so.

53. Reverting to what we do need to decide, I consider, as I have already said, that the only question is whether Abacus was entitled to include the entirety of the gym costs in the Residential pot. (I have not overlooked the Leaseholders' contention that as well as the direct gym costs, they are being made to bear what they call the indirect gym costs – that is the share of common costs that would have been apportioned to the Gym Tenant had his lease required him to pay service charges – but I do not think this in truth raises any separate question). By the terms of paragraph 10(a)(i), the answer to that question depends on whether Abacus was "acting reasonably" in designating all such costs as a Residential Service Charge Item.

s. 27A Landlord and Tenant Act 1985

54. Legislation controlling the recoverability of service charges was first introduced by the Housing Finance Act 1972 and is now found in ss. 18 to 30 L&TA 1985. The protection for tenants has been progressively extended by amendments and additions to these provisions since they were first enacted.

55. The primary protection is in s. 19(1) L&TA 1985 which provides that costs incurred or to be incurred by a landlord shall be taken into account in determining the amount of a service charge only "to the extent that they are reasonably incurred", and, where incurred on services or works, only if they are "of a reasonable standard". As already referred to, it is not suggested in the present case that either limb of s. 19(1) is engaged.

56. Instead the application is brought under s. 27A L&TA 1985. This was introduced by the Commonhold and Leasehold Reform Act 2002. It provides, so far as relevant, as follows:

> "**27A Liability to pay service charges: jurisdiction**
>
> (1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to—
>
> (a) the person by whom it is payable,
>
> (b) the person to whom it is payable,
>
> (c) the amount which is payable,
>
> (d) the date at or by which it is payable, and
>
> (e) the manner in which it is payable.
>
> (2) Subsection (1) applies whether or not any payment has been made.
>
> (3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to—
>
> (a) the person by whom it would be payable,
>
> (b) the person to whom it would be payable,
>
> (c) the amount which would be payable,
>
> (d) the date at or by which it would be payable, and
>
> (e) the manner in which it would be payable.
>
> …
>
> (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
>
> (a) in a particular manner, or

> (b) on particular evidence,
>
> of any question which may be the subject of an application under subsection (1) or (3)."

57. Before the decision of the Supreme Court in *Aviva*, there was authority of this Court that the effect of s.27A(6) was to render void a provision in a lease that enabled the landlord to make a discretionary decision as to the apportionment of a service charge: see *Oliver v Sheffield City Council* [2017] EWCA Civ 225, [2017] 1 WLR 4473 at [53]-[55] per Briggs LJ (as he then was), approving two decisions of the Upper Tribunal to that effect, *Windermere Marina Village Ltd v Wild* [2014] UKUT 163 (LC) and *Gater v Wellington Real Estate Ltd* [2014] UKUT 561 (LC). But in *Aviva* the Supreme Court overruled the *Oliver* case, Lord Briggs JSC (as he had become) confessing that his earlier view had been wrong. The effect of s. 27A(6) is not to transfer a landlord's discretionary powers in relation to service charges to the FTT (something which would produce "bizarre and surely unintended" results); rather, it is to enable the FTT to conduct a "review of the contractual and statutory lawfulness of the service charge demanded". In other words the jurisdiction of the FTT is "limited to deciding whether the landlord acted in breach of contract or in contravention of the statutory scheme regulating residential service charges": *Aviva* at [21].

58. In the present case the statutory scheme regulating residential service charges does not say anything about the apportionment of service charges to lessees: s. 19(1), as explained above, is concerned with whether costs have been reasonably incurred, or whether work or services are of a reasonable standard, not with how those costs are borne. So the only question for the FTT was whether the service charges demanded were in accordance with the contractual provisions in the relevant leases.

59. As set out above, the relevant contractual provision in the present case is the provision in paragraph 10(4)(a)(i) of schedule 4 to the effect that included in the Residential Service Charge pot are:

> "such of the costs charges and expenses which the Landlord shall incur in complying with its obligations set out in Part I of the Sixth Schedule hereto which *the Landlord (acting reasonably) designates* as being a Residential Service Charge Item" (emphasis added).

For reasons already explained, if Abacus was acting reasonably in designating the gym costs as a Residential Service Charge Item, then I do not think we are concerned with the question whether the leaseholders are being asked to pay a "fair proportion" of them, this in my view being solely concerned with splitting such costs between the leaseholders, as to which there is no dispute.

60. Before addressing this question there is one other point to make on the wording of the Flat Leases, which is, as already noted, that paragraph 10(f) of schedule 4 entitles the Landlord *"in its reasonable discretion"* to designate whether an item of expenditure shall be treated as a Residential Service Charge Item and/or a Building Service Charge Item and/or a Parking Service Charge Item. I think the two provisions in paragraph 10(a)(i) and 10(f) must be read together; it is impossible to think (nor was this suggested) that these two references to the Landlord designating expenditure as a Residential Service Charge Item were intended to have a different effect. So when we

read in paragraph 10(a)(i) a reference to the Landlord "acting reasonably" in designating an item, we must understand this as meaning the same as the Landlord designating the item "in its reasonable discretion".

Legal principles

61. So how is such a provision to be understood, that is a provision in a lease which confers on the landlord a reasonable discretion, or a right to make a decision acting reasonably? We were cited a large number of cases from a variety of different fields. These provide helpful guidance, and certain points seem to me reasonably clear.

62. First, a lease is a contract. It is of course a particular type of contract as it is the grant of an estate in land. But it also contains provisions, such as the service charge provisions, which regulate the continuing relationship between landlord and tenant, and the general principles applicable to contracts apply to such provisions in leases just as they do to other contracts.

63. Second, Courts are regularly required to decide questions of reasonableness on the basis of what have been called in the cases "entirely objective" criteria. The usual examples given are a duty to take reasonable care, or the fixing of a reasonable price, or of a reasonable time: see *Socimer International Bank Ltd (in liquidation) v Standard Bank Ltd* [2008] EWCA Civ 116, [2008] Bus LR 1304 (***"Socimer"***) at [66] per Rix LJ, *Lehman Brothers Special Financing Inc v National Power Corporation* [2018] EWHC 487 (Comm), [2019] 3 All ER 53 (***"Lehman Bros"***) at [63] per Robin Knowles J. The distinctive thing about such provisions (often the result of an implied term, either at common law or under statute) is that no decision-making power is conferred on either of the contracting parties. In the event of a dispute, therefore, the decision has to be that of the Court: see *Socimer* at [66] per Rix LJ, referring to the way in which it was put by Laws LJ in argument ("on entirely objective criteria of reasonableness the decision-maker becomes the Court itself"). And see *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661 (***"Braganza"***) at [19] where Baroness Hale DPSC refers to the question whether the Court is the "primary decision-maker".

64. Third, it is well established that even if a contract confers an apparently unqualified discretion on one of the contracting parties, there are implicit constraints on the exercise of the discretion. The previous cases were collected by Rix LJ in *Socimer* at [60]-[64], and summarised by him at [66] as follows:

> "It is plain from these authorities that a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality."

Rix LJ said that the concern was that the discretion should not be abused, and that although "reasonableness" and "unreasonableness" were also concepts deployed in this context, they were only used in a sense "analogous to *Wednesbury* unreasonableness" (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223), which for the sake of clarity he preferred to call "rationality".

65. This principle was endorsed and applied by the Supreme Court in *Braganza* which concerned a contract of employment under which benefits were payable on the death of an employee in service, but not if "in the opinion of the company" death resulted from the employee's wilful act. (This is not I think strictly speaking a case of a discretion being conferred on the employer, but rather of a power to make a contractually binding decision, but the same principles apply). The decision was neatly summarised by Lewison LJ in *Waaler v Hounslow LBC* [2017] EWCA Civ 45, [2017] 1 WLR 2817 (***"Waaler"***) at [20] as follows:

> "It was, I believe, agreed by all members of the court that the exercise of a contractual discretion is constrained by an implied term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose; and that the result is not so outrageous that no reasonable decision-maker could have reached it: para 30 (Baroness Hale of Richmond DSPC); para 53 (Lord Hodge JSC) and para 103 (Lord Neuberger of Abbotsbury PSC). However, as Lord Hodge pointed out this is a rationality review, not the application of an objective test of reasonableness."

It is clear that this "rationality" test is in some respects analogous to that applicable in public law to judicial review of decisions by public bodies, but the Supreme Court did not suggest in *Braganza* that they were precisely the same (see per Baroness Hale at [28] referring to the contractual implied term "drawing closer and closer to the principles applicable in judicial review"), and did not consider it necessary to reach any final conclusion on the precise extent to which they might differ (see per Baroness Hale at [32]).

66. Fourth, in *Waaler* the question was whether certain costs were reasonably incurred within the meaning of s. 19 L&TA 1985. Lewison LJ (with whom Burnett and Patten LJJ agreed) held (at [23]) that so far as the landlord's *contractual* ability to pass on costs was concerned, its decision both when choosing between different possible methods of repair, and when deciding whether to carry out optional improvements, was subject to the rationality test approved in *Braganza*; but (at [29]) that the question whether costs were of a reasonable standard or reasonably incurred within the meaning of s. 19 L&TA 1985 must "be decided by reference to an objective test just as that test would be applied to deciding whether a price was a reasonable price".

Application to present case

67. Against that background it is now possible to address the question in the present case. Much of the argument was conducted on the basis that the question was whether the appropriate test was that of "rationality" or "objective reasonableness". That is not perhaps surprising in light of the authorities, but ultimately I did not find this the most helpful way of characterising the question.

68. Thus on the one hand it is clear that the task before the FTT was not to act as primary decision-maker. The starting point is the wording of the contractual provisions and here the Flat Leases confer on the Landlord the right in its discretion to designate items of expenditure as Residential Service Charge Items. That contractual allocation

of the power to make the decision has to be respected. The suggestion that the effect of s. 27A(6) L&TA 1985 was to render such a provision void and transfer the power to determine the apportionment of service charges to the FTT was the very point disapproved of by the Supreme Court in *Aviva*. So it is quite clear that there is no question of the FTT deciding the question for itself from scratch as if it were deciding ("on entirely objective criteria") what a reasonable price, or a reasonable time, is. Rather the function of the FTT is, as Lord Briggs puts it in *Aviva*, "limited to deciding whether the landlord acted in breach of contract".

69. For this reason I do not accept the submission of Mr Walsh that the task of the FTT is similar to that on an application under s. 19 L&TA 1985 raising the question whether costs have been reasonably incurred or are of a reasonable amount. As decided by this Court in *Waaler*, that gives the FTT a jurisdiction to decide for itself, by reference to an objective standard, whether costs have been reasonably incurred or are of a reasonable amount, not just to police the landlord's decisions. It seems to me clear from *Aviva* that the role of the FTT on an application under s. 27A is the different one of deciding if the landlord's decisions are in accordance with the contract or not.

70. On the other hand, I agree with the Judge that *Aviva* is not authority for the proposition that whenever a discretion is conferred by a lease on a landlord, and whatever the language used in the lease, the FTT's function is limited to a rationality review of the type envisaged by *Braganza*. It is true that Lord Briggs twice refers in *Aviva* to the FTT conducting a *Braganza* rationality review: see at [15] and [16]. But I agree with the Judge on this. She repeated what she had said in an earlier UT decision, *Hawk Investment Properties Ltd v Eames* [2023] UKUT 168 (LC) (***"Hawk Investment"***), namely that in *Aviva* at [15]-[16] Lord Briggs is considering the background or general law rather than the facts of the particular case, and that when in [33] he applied the law to the particular provision in question in *Aviva* (which referred to the apportionment of costs being "such part as the Landlord may otherwise reasonably determine") he said that the question for the FTT was whether the re-apportionment had been "reasonable". As the Judge says, if Lord Briggs had meant "rational" he no doubt would have said so.

71. Moreover I think there is some force in the point made by the Judge that the parties presumably meant something by expressly requiring the Landlord to act reasonably or to make a decision in its reasonable discretion. It would seem odd if a discretion expressly qualified in that way meant exactly the same as a wholly unqualified discretion. This is especially so where, as Mr Walsh pointed out, the person drafting the Flat Leases did elsewhere go out of his way to confer an absolute discretion on the Landlord: see paragraph 10(d) of schedule 4 (set out at paragraph 8 above).

72. So I agree that the requirement that the Landlord act reasonably does mean reasonably, and not just rationally. But I do not think that by itself answers the question. The question for the FTT as I have said is whether the Landlord acted in breach of contract. The Landlord will have acted in breach of contract if, and only if, it can be said to have acted unreasonably, or to have not exercised a reasonable discretion. The very fact that the Landlord is given a discretion indicates that where there is a range of possible views, it is the Landlord who is entitled to choose between them. It is not therefore a question of how the FTT would have chosen had the decision been for them, but of whether the Landlord's choice was outside the range of permissible decisions. Only if it was will the Landlord have acted in breach of

contract such as to entitle the FTT to decide that the service charge is not payable.

73. What then is the limit of permissible decisions? I do not think one can improve on the way it was put by Lewis LJ in argument, namely that a decision is a permissible one if it is one that a landlord acting reasonably could reach. Or to put it negatively, the landlord's decision will be flawed only if it is one that no reasonable landlord could have reached.

74. Such a test accords with the long-established principles applicable to the question whether a landlord's consent has been unreasonably withheld: see *Ashworth Frazer Ltd v Gloucester City Council* [2001] UKHL 59, [2001] 1 WLR 2180 at [5] per Lord Bingham, referring to the statement by Danckwerts LJ in *Pimms Ltd v Tallow Chandlers Company* [1964] 2 QB 547 at 564 that the question was whether the landlord's conclusions were conclusions "which might be reached by a reasonable man in the circumstances"; see also at [70]-[71] per Lord Rodger referring to what "a reasonable landlord" might decide, and whether "no reasonable landlord … would withhold consent". I do not think any sensible distinction can be drawn between the question whether a landlord is acting reasonably in refusing consent or is acting reasonably in designating costs as a service charge item.

75. This conclusion is also in line with certain decisions on the ISDA Master Agreement. In *Peregrine Fixed Income Ltd v Robinson Department Store Public Co Ltd* [2000] CLC 1328 the relevant provision applied where a Market Quotation "would not (in the reasonable belief of the party making the determination) produce a commercially reasonable result". Moore-Bick J held that the question was whether the belief was "one which can reasonably be held" (at [38]) and that in the case before him the relevant party's belief was not one "a reasonable person in its position, properly directing himself in accordance with the Agreement, could hold" (at [39]). Similarly in *Fondazione Enasarco v Lehman Brothers Finance SA* [2015] EWHC 1307 (Ch) the provision in question referred to an amount that the relevant party "reasonably determines in good faith" to be its total losses. David Richards J held that that party "is not required to comply with some objective standard of care as in a claim for negligence, but, expressing it negatively, must not arrive at a determination which no reasonable non-defaulting party could come to" (at [53]).

76. Admittedly Robin Knowles J took a different view in *Lehman Bros* where the relevant provision provided that an amount would be determined by the Determining Party "which will act in good faith and use commercially reasonable procedures to produce a commercially reasonable result". He held (at [81]) that this form of agreement required the Determining Party "to use procedures that are, objectively, commercially reasonable in order to produce, objectively, a reasonable result". I can see that this language, expressly referring to the result or outcome as "commercially reasonable" may be more open to such an interpretation. The same may be true of the Judge's decision in *Hawk Investment* where the relevant provision in the lease required the proportion of the service charge to be calculated by "some other just and equitable method". This is an illustration of the fact that one cannot necessarily give a single answer that applies across the board: as with any other question of contractual interpretation, it will depend on the precise wording of the provision in question.

77. But in the present case, once one puts on one side the reference to a fair proportion (which, as I have accepted above, applies only to the second stage of apportioning the

relevant service charge items between the lessees, and not to the first stage of deciding what goes into the pot), then one is left with the provisions in the Flat Leases that the Landlord is to act reasonably in designating, and is to exercise a reasonable discretion. For the reasons I have given the Landlord is in my judgement only in breach of those provisions if it makes a decision that no reasonable landlord could have done.

78. I do not think this test is best described as a test of "objective reasonableness". As Lewison LJ referred to in *Waaler*, the language of objective reasonableness suggests that it is for the FTT to form its own view just as if deciding whether a price was a reasonable price. But that is not the exercise the FTT is obliged to carry out.

79. That is why I have not found the debate about whether the FTT is to apply a rationality test or a test of objective reasonableness a useful one in practice. I prefer to say that in a case like this the role of the FTT is limited to deciding whether a landlord has acted in breach of contract; that a landlord will only have acted in breach of contract if the decision it has made was not one open to it in the circumstances; and that where the lease requires the landlord to act reasonably or exercise a reasonable discretion, that will only be so if the decision is one that no reasonable landlord could have reached.

Did the FTT err?

80. It is now possible to go back to the FTT decision and consider if they erred. They cited a passage from *Woodfall* to the effect that "in considering whether the landlord's decision is a reasonable one, the Tribunal must afford him a margin of appreciation" and a passage from *Regent Management Ltd v Jones* [2010] UKUT 369 (LC) as follows:

> "The test is whether the service charge that was made was a reasonable one; not whether there were other possible ways of charging that might have been thought better or more reasonable. There may be several different ways of dealing with a particular problem of management. All of them may be perfectly reasonable. Each may have its own advantages and disadvantages. Some people may favour one set of advantages and disadvantages, others another. The LVT may have its own view. If the choice had been left to the LVT it might not have chosen what the management company chose but that does not necessarily make what the management company chose unreasonable."

81. They then gave their conclusion as follows (at [28] of their decision):

> "In the present case the landlord appears to have had two options from 2013 onwards: to continue to charge the gym expenses to the tenants as before or to bear part of the charges itself to reflect the shared use of the gym between the residents and the gym tenant. The Respondent landlord chose the first option which it was entitled under the terms of the lease to do. That choice, although unpalatable to the residential tenants cannot therefore be said to be unreasonable. It was not a decision of the type where it could be said that no reasonable landlord in a similar position could ever have made it."

82. In the UT Decision the Judge first concluded that the landlord's decision must be objectively reasonable (at [105]) and continued:

> "106 Accordingly if the FTT intended to apply a *Braganza* rationality test it was wrong.
>
> 107 If the FTT did indeed intend to apply a test of objective reasonableness then in my judgment it reached the wrong outcome. It is manifestly unfair, and therefore not objectively reasonable, for the residential leaseholders to pay the whole of the gym costs after 2020 when they no longer have exclusive use of the gym. The landlord in 2013 decided to grant the gym lease in extraordinarily generous terms, and the respondent is now seeking to charge that generosity to the residential tenants. I cannot understand how that is not unfair."

83. As can be seen the FTT, which no doubt had the benefit of much less citation of authorities than we did, did not in fact direct themselves in terms of whether the test they should apply was one of *Braganza* rationality or one of objective reasonableness; but they did ask themselves whether the decision was one that no reasonable landlord could have made. For the reasons I have sought to give, that seems to me the correct test, and I do not think they erred in asking that question.

84. That then leaves the question whether the conclusion that they reached when applying this test was one that was open to them. I think it was. This is a question of fact, or perhaps more accurately a question of evaluative assessment of the facts. There are two reasons why such assessments by the FTT are to be given a considerable degree of deference. First, an appeal only lies to the UT on a point of law: see s. 11(1) of the Tribunals, Courts and Enforcement Act 2007. And second, the FTT is a specialist tribunal, and considerable deference is to be given to the assessment of such a tribunal. These principles are well-established and very familiar: see for example *Ullah v Secretary of State for the Home Department* [2024] EWCA Civ 201, [2024] 1 WLR 4055 at [26] per Green LJ. In essence, even if the UT would not have made the same assessment itself, it is bound to respect the factual assessment of the FTT unless it can be said that the true and only reasonable conclusion contradicts its determination.

85. I do not think that can be said here. Since this very much depends on the rather unusual facts, and does not involve any question of principle, I can give my reasons quite briefly. It is not difficult to understand why the Leaseholders considered it unreasonable for them to be asked to pick up the entirety of the gym costs: Mr Walsh relied both on the fact that they no longer had unrestricted access to the gym, and to the fact that the use by Mr White and his clients would lead to costs such as heating and lighting, and greater wear and tear on the gym and its equipment, all of which was being charged to the residential leaseholders. Nor is it difficult to see why the Judge thought that unfair. But that is not the question. The question is whether the FTT could properly have taken the view that a reasonable landlord could charge the costs to the leaseholders.

86. I think the FTT was entitled to take that view. The terms of the Gym Lease might well be thought unusual or generous (as both the FTT and UT said) but the Gym

Tenant was not intended to have exclusive use of the gym: as the Gym Lease makes clear, it was expressly made subject to the rights of the leaseholders. There may be a question whether the way in which Mr White is now apparently restricting their use of the gym is in accordance with their rights, but that is a question between them and him and cannot be resolved in these proceedings, to which he is not a party. On any view however the arrangement between the Landlord and the Gym Tenant was very unlike an exclusive letting of the gym; it was in effect an agreement that the Gym Tenant could share use of the gym on terms that he provided certain services to the leaseholders, and also paid a relatively modest rent which was treated by the Landlord as a contribution to the running costs of the gym. The Landlord was obliged by the terms of the Flat Leases to maintain the gym as part of the Common Parts, the costs of which would be passed on to the leaseholders; and one can see that it might have been thought both reasonable and in the interests of leaseholders to have the Gym Tenant contributing to the gym costs in this way.

87. If so, the fact that in practice no rent is currently being received, and that the costs of maintenance and repair are much more significant than might have been anticipated, does not necessarily change the principle. So far as Abacus is concerned, it is still obliged (both under the Flat Leases and the Gym Lease) to incur costs on maintaining the gym and renewing equipment, something which is or ought to be for the benefit of the leaseholders as well as Mr White and his clients. If Abacus cannot recover such costs through the service charge it will have to bear them itself, although it would derive no benefit from them. It is true, as Mr Walsh submitted, that there is no general principle that a landlord will always recover 100% of his expenditure through service charges (see eg *Campbell v Daejan Properties Ltd* [2012] EWCA Civ 1503 at [56] per Jackson LJ). But if Abacus is unable to pass on maintenance costs, that will tend to incline it to spend the very minimum that it can on the gym. It is not obvious that that would be in the interests of the leaseholders.

88. In those circumstances I think the FTT could properly take the view that the decision to charge the gym costs to the leaseholders was "not a decision of the type where it could be said that no reasonable landlord in a similar position could ever have made it."

89. On that basis the FTT did not err in law, and the UT was not entitled to substitute its own view of the reasonableness or fairness of the Landlord's decision.

Conclusion

90. I would allow the appeal and restore the decision of the FTT. In those circumstances the cross-appeal does not arise.

Lord Justice Jeremy Baker:

91. I agree.

Lord Justice Lewis:

92. I also agree.